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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2080

THE MEAD CORPORATION and WESTVACO CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, The Mead Corporation ("Mead") and Westvaco Corporation ("Westvaco"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered March 31, 1980.

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[1] The 106 plaintiffs-appellees-respondents are listed in Appendix A hereto. In addition to The Mead Corporation and Westvaco Corporation, Georgia-Pacific Corporation and Crown Zellerbach Corporation were appellants in the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit,[2] appears in Appendix B hereto,[3] and that of the United States District Court for the Southern District of Texas, appears in Appendix C hereto.[4]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 31, 1980, and this petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the same judge should be permitted to preside over the trials of both criminal and related civil antitrust conspiracy cases?

2. Whether disqualification of a presiding district court judge, because of an appearance of partiality, is required in a civil antitrust conspiracy case when the judge in a companion criminal case involving many of the same issues, parties and evidence ruled that the alleged conspiracy exists by a preponderance of the evidence and when that judge has prejudged critical factual and evi-

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[2] *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980).

[3] In the Court of Appeals, this case was styled *In re Corrugated Container Antitrust Litigation: Steering Committee, et al., Plaintiffs-Appellees* v. *The Mead Corporation, et al., Defendants-Appellants; In Re The Mead Corporation, Petitioner*, Nos. 79-3369, 79-3653.

[4] In the District Court, this case was styled *In re Corrugated Container Antitrust Litigation*, M.D.L. 310.

dentiary determinations which he will be required to make again in the civil trial?

3. Whether disqualification of a presiding district court judge, because of an appearance of partiality, is required when the judge makes out-of-court statements that it is his belief that the defendants are guilty?

STATUTE INVOLVED

Sections 455(a) and (b)(1) of Title 28 of the United States Code provide:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

STATEMENT OF THE CASE

I. History of the Proceeding

A. *The Civil Cases*

Petitioners are two of 37 corrugated container manufacturers named as defendants in one or more of 55 treble damage antitrust actions alleging an eighteen-year nationwide conspiracy to fix, raise, maintain and stabilize the prices of corrugated containers and sheets.[5] These various civil cases were consolidated for pretrial

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[5] *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) ("M.D.L. 310").

proceedings, pursuant to 28 U.S.C. § 1407, and assigned to the Honorable John V. Singleton, Jr.[6]

On September 6, 1978, the district court certified a class of all purchasers of corrugated containers or corrugated sheets from defendants during January 1, 1960, to January 25, 1978, estimated to include 300,000 members.[7]

The pressures created by the enormous damage exposure and settlement tactics of plaintiffs resulted in settlements by all but 3 defendants, totalling over $300 million.

B. *The Criminal Cases*

The civil lawsuits were precipitated by a federal grand jury investigation of the corrugated industry which culminated in price-fixing indictments. One indictment charged nine corporations and nine individuals with felony violations.[8] The second indictment charged five corporations and seventeen individuals with misdemeanor violations.[9] The indictments alleged that the defendant manufacturers and numerous co-conspirators participated in a single, almost nationwide conspiracy to raise, fix, maintain and stabilize prices of corrugated containers

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[6] *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.L. 1977).

[7] *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. December 29, 1978).

[8] *United States* v. *International Paper Co.*, Crim. No. H-78-11 (S.D. Tex. filed January 25, 1978).

[9] *United States* v. *Boise Cascade Corp.*, Crim. No. H-78-12 (S.D. Tex. filed January 25, 1978).

and corrugated sheets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Petitioner Mead was named as a defendant in the felony indictment. Mead, one other corporation, and seven individual defendants elected to stand trial, which commenced on January 22, 1979 before Judge Singleton. On April 27, 1979, those defendants were acquitted by unanimous jury verdict.

Petitioner Westvaco was not named in either indictment.

C. *Offenses Charged*

The allegations of the criminal indictments and civil complaints are virtually identical:[10]

> Beginning sometime prior to 1960, . . . and continuing thereafter until the date of the return of this indictment (January 25, 1978), the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Felony Indictment, ¶ 9; Civil Complaint, ¶ 18.
>
> The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the prices of corrugated containers and corrugated sheets. Felony Indictment, ¶ 10; Civil Complaint, ¶ 19.

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[10] All three documents contain sections entitled "Trade and Commerce" in which the language is word-for-word identical, with the exception of the geographic scope of sales of defendants (Unified and Consolidated Complaint, ¶¶ 14, 15, 16, 17; Felony Indictment, ¶¶ 5, 6, 7, 8; Misdemeanor Indictment, ¶¶ 4, 5, 6, 7).

In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) disclosed to other members of the conspiracy prices charged or quoted or the price to be charged or quoted to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(b) received from other members of the conspiracy prices charged or quoted or the price to be charged or quoted to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(c) submitted noncompetitive bids or quotations or no bids or quotations to buyers of corrugated containers and corrugated sheets; and

(d) took steps to enforce compliance with the aforesaid combination and conspiracy. Felony Indictment, ¶¶ 9, 10, 11; Civil Complaint, ¶¶ 18, 19, 20.[11]

Thus, the Unified and Consolidated Complaint, in its critical allegations, is a carbon copy of the criminal indictments.

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[11] The misdemeanor indictment is identical except that those defendants' alleged participation in the alleged conspiracy ended December 21, 1974. Misdemeanor Indictment, ¶¶ 8, 9, 10.

II. The Decisions Below in the District Court and the Fifth Circuit

A. *Motions by Petitioners*

On August 30, 1979, long before the commencement of the civil trial, petitioner Mead moved that Judge Singleton recuse himself from further presiding in M.D.L. 310. Westvaco Corporation, Georgia-Pacific Corporation and Crown Zellerbach Corporation [12] joined in the motion.

B. *The District Court's Decision*

At a pretrial hearing on September 5, 1979, Judge Singleton, rather than assign the disqualification matter to another judge for resolution, orally denied petitioners' motion without argument, and denied a motion to stay proceedings in M.D.L. 310 pending appeal.[13]

On September 11, 1979, Judge Singleton filed a Memorandum and Order in support of his denial of defendants' motion for recusal in which he admitted the key operative facts which formed the basis of the motion.

C. *Appeals To and Decisions of the Fifth Circuit*

All petitioners appealed from denial of their motions to recuse.[14] On March 31, 1980, a panel of the Fifth Circuit denied petitioners' appeal and request for a writ of mandamus.

The Fifth Circuit determined that the district court's evidentiary findings during the criminal trial, pursuant to *United States* v. *James*, 576 F.2d 1121 (5th Cir.

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[12] Georgia-Pacific and Crown Zellerbach have subsequently settled claims with plaintiffs.

[13] *In re Corrugated Container Antitrust Litigation*, M.D.L. 310, September 5, 1979, Pretrial Hearing Tr. at 1.

[14] Petitioners also requested a writ of mandamus.

1978), *modified*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979), that a conspiracy existed as a precondition for admitting hearsay statements of co-conspirators under Rule 801(d)(2)(E), Fed. R. Evid., did not indicate bias or prejudgment under 28 U.S.C. § 455 sufficient to require disqualification from presiding over the civil trial. The Fifth Circuit also ruled that Judge Singeton's out-of-court statements concerning defendants' guilt were not extra-judicial facts indicating bias as purportedly required by the statute.

III. The District Court's Conduct Indicating an Appearance of Partiality

A. *Judge Singleton's Factual Findings as to the Existence of a Conspiracy*

During the criminal trial, Judge Singleton twice found as a matter of fact that (a) the conspiracy alleged in the indictments did in fact exist, (b) defendants in the criminal trial generally were members of that conspiracy, and (c) petitioner Mead specifically was a member.

In ruling that hearsay statements of alleged co-conspirators offered by the government would be admitted into evidence under Rule 801(d)(2)(E), Fed. R. Evid., Judge Singleton, on February 20, 1979, determined "that there is substantial evidence in the record of the existence of the conspiracy" and the "membership of each of the defendants" in such conspiracy.[15]

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[15] *United States* v. *International Paper Co.*, Crim. No. H-78-11 (S.D. Tex. February 20, 1979), Tr. Vol. 33 at 6-10. The court applied the prevailing standard in the Fifth Circuit for determining the admissibility of hearsay statements of co-conspirators, *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *modified*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979).

Then, at the close of all the evidence at the criminal trial, Judge Singleton found:

> . . . *by a preponderance of the evidence*, independent of any out-of-court statements by any co-conspirator that the conspiracy existed, that the co-conspirators and the defendants were members of the conspiracy, and that any out-of-court statements that were offered into evidence were made during the course of and in furtherance of the conspiracy . . . .[16]

Thus, in the criminal trial, Judge Singleton made findings which are precisely the issue at stake in the civil trial.

B. *Judge Singleton's Out-of-Court Statements of Defendants' Guilt*

Notwithstanding the Court's evidentiary rulings, the jury acquitted all defendants in the criminal case. Previously, the vast majority of defendants in the civil cases had settled plaintiffs' claims. Following the jury verdict, Judge Singleton made out-of-court statements concerning defendants' guilt which demonstrate that his impartiality might reasonably be questioned. Judge Singleton stated to counsel for one of the criminal defendants, at a golf outing after the verdict, that

> the acquittals were just a quirk because the government had much more damaging evidence it could have introduced but that the jury did not hear . . .,

that

> the lawyers for the civil plaintiffs are sharp and that the evidence which was not introduced in the criminal case would come out in the civil cases . . .,

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[16] *United States* v. *International Paper Co.*, Crim. No. H-78-11 (S.D. Tex. April 25, 1979), Tr. Vol. 105 at 7 (emphasis added). In so holding, the court once again applied the test of *United States* v. *James, supra.*

and that

> the defendants must be guilty since they paid $300 million in settlements because smart people did not pay that kind of money unless there was more evidence than what the jury in the criminal case heard.

On the basis of these remarks by Judge Singleton, it was "clear" to the defense counsel to whom they were addressed that

> there was no question in the Judge's mind concerning the criminal defendants' guilt and that the Judge blamed the verdict on the inadequacy of the government attorneys . . . .[17]

Thus, the appearance of partiality against the civil defendants certainly exists in such circumstances.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the issue of judicial disqualification under 28 U.S.C. § 455 raises important questions of federal law and judicial administration which have not been, but should be, settled by this Court.

I. The Same Judge Should not be Permitted to Preside Over the Trial of Civil Antitrust Conspiracy Cases When in a Related Criminal Case He Has Previously Found by a Preponderance of the Evidence that the Alleged Conspiracy Existed.

In recent years it has become commonplace in the antitrust field for private class action civil antitrust conspiracy cases to be filed on the heels of a related govern-

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[17] These statements are taken from affidavits of counsel for Mead reflecting Judge Singleton's statements to defense counsel as related to counsel for Mead. On appeal, these statements are required to be taken as true. *Berger* v. *United States*, 255 U.S. 22, 36 (1921).

ment criminal antitrust conspiracy case.[18] Courts in different districts have handled the assignment of such cases differently. In the *Folding Carton Antitrust Litigation*, M.D.L. 250, the Northern District of Illinois judges assigned the civil class action cases to a different judge than the judge who had been assigned the criminal case. In contrast, in the *Corrugated Container Antitrust Litigation*, M.D.L. 310, the criminal and civil cases were assigned by the Southern District of Texas to the same judge—Judge Singleton. To our knowledge, the corrugated container class action cases represent the first na-

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[18] *See, e.g., Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89 (1954); *Emich Motors* v. *General Motors Corp.*, 340 U.S. 558 (1951); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *International Salt Co.* v. *Ohio Turnpike Commission*, 392 F.2d 579 (8th Cir.), *cert. dismissed*, 393 U.S. 947 (1968); *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F.2d 533 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *Dart Drug Corp.* v. *Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965); *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F.2d 721 (10th Cir. 1955); *Loew's Inc.* v. *Cinema Amusements, Inc.*, 210 F.2d 86 (10th Cir.), *cert. denied*, 347 U.S. 976 (1954); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968); *Texaco, Inc.* v. *Borda*, 383 F.2d 607 (3d Cir. 1967); *Dienstag* v. *Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970); *D'Ippolito* v. *American Oil Co.*, 272 F. Supp. 310 (S.D.N.Y. 1967); *Corona Construction Co.* v. *Ampress Brick Co.*, 376 F. Supp. 598 (N.D. Ill. 1974); *Illinois* v. *Harper & Row Publishers, Inc.*, 1969 Trade Cas. ¶ 72,784 (N.D. Ill. 1968), *cert. denied*, 394 U.S. 944 (1969); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 41 F.R.D. 518 (E.D. Pa. 1967).

tional class action antitrust case to be tried before the same judge who presided over the trial of the companion criminal trial. The result has created a situation where the appearance of partiality of the judge might reasonably be questioned under 28 U.S.C. § 455.

Section 455 of Title 28 of the United States Code governs disqualification of federal judges on the basis of the appearance of partiality, and in pertinent part provides that:

> (a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[19]

Section 455(a) contains a general, broad provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Its legislative purpose is "to promote the public confidence in the impartiality of the judicial process," and to eliminate the "so-called 'duty to sit' . . . ." [20] Disqualification is now mandated if "there is a reasonable factual basis for doubting the judge's impartiality . . . ." [21]

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[19] The statute was amended in 1974 to conform federal statutory grounds for disqualification with the Code of Judicial Conduct and to "broaden and clarify the grounds for disqualification." 119 Cong. Rec. 33029 (1973). The Fifth Circuit, however, erroneously interpreted § 455 to have the same narrow construction as 28 U.S.C. § 144.

[20] H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355.

[21] H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355.

This Court has not yet decided, but should decide in this case, whether, under § 455, as amended, a judge must disqualify himself when he has predetermined by a preponderance of the evidence the ultimate issue in a civil case by evidentiary findings made in a related case. Whether, under these circumstances, a trial judge is disqualified is a question which should be settled by this Court in the exercise of its responsibility to supervise lower federal courts. The proper construction of § 455, as amended, should be determined by this Court because of its wide impact on the federal judiciary.

This petition raises an issue of first impression.[22] In order to preserve the appearance of impartiality under 28 U.S.C. § 455, the same judge should not preside over related criminal and civil antitrust conspiracy cases.

The issue of admissibility of co-conspirator hearsay statements arises in virtually every antitrust conspiracy case that goes to trial, thereby creating a "partiality" issue if the same judge presides over the trial of companion civil cases. All circuits require an evidentiary determination as a precondition to admitting hearsay statements of alleged co-conspirators pursuant to Rule 801(d)(2)(E), Fed. R. Evid.[23] The majority—the First,

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[22] *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 964 (5th Cir. 1980).

[23] *United States* v. *Petrozziello*, 548 F.2d 20 (1st Cir. 1977); *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States* v. *Stroupe*, 538 F.2d 1063 (4th Cir. 1976); *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *modified*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States* v. *Testa*, 548

Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth—require such a determination by a "preponderance of the evidence," which is the same burden of proof in civil conspiracy cases.[24]

The need for review by this Court has now become more acute with the recent adoption by several circuits—the Fourth, Sixth, Seventh and Eighth—of the preponderance of the evidence standard and the abandonment of the *prima facie* test to judge the admissibility of hearsay statements of co-conspirators under Rule 801(d)(2)(E), Fed. R. Evid.[25] The issue of disqualification of a judge

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F.2d 847 (9th Cir. 1977); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978); *United States* v. *Jackson*, No. 77-1768 (D.C. Cir. January 29, 1980).

[24] *United States* v. *Martorano*, 557 F.2d 1 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States* v. *Trowery*, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States* v. *Stroupe*, 538 F.2d 1036 (4th Cir. 1976); *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *modified*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978). The Ninth Circuit has retained a *prima facie* test to determine admissibility of co-conspirator hearsay statements. *United States* v. *Rosales*, 584 F.2d 870 (9th Cir. 1978). In the District of Columbia Circuit, the trial judge admits co-conspirator hearsay statements upon finding substantial, independent evidence of a conspiracy. *United States* v. *Gantt*, 617 F.2d 831 (D.C. Cir. 1980).

[25] Fourth Circuit: *compare, United States* v. *Vaught*, 485 F.2d 320 (4th Cir. 1973) *with United States* v. *Stroupe*, 538 F.2d 1036 (4th Cir. 1976); Sixth Circuit: *compare United*

who has predetermined by a preponderance of the evidence the ultimate issue in a civil antitrust conspiracy trial compels review by this Court.

Under current standards for the admissibility of co-conspirator hearsay statements, the trial judge's decision "calls for the exercise of judicial fact-finding responsibilities . . . which require him to evaluate both credibility and the weight of the evidence." *United States* v. *Enright*, 579 F.2d 980, 985 (6th Cir. 1978). Thus, the trial judge, because of his role in the earlier criminal trial, has now prejudged the guilt of the defendants by applying the precise standard which the jury must utilize in the companion civil conspiracy trial. Having previously answered the ultimate question to be decided by the jury in the civil trial, it would be difficult, if not impossible, for the trial judge to divorce his previous ruling from his conduct in the companion civil trial. This is precisely the appearance of partiality which 28 U.S.C. § 455 was designed to avoid. Indeed, a more compelling appearance of partiality is difficult to conceive.

Although trial judges frequently rule on the admissibility of evidence and on its sufficiency for submission to a jury, none of these other evidentiary rulings places the judge in the position of ultimate fact-finder, applying precisely the *same standard* to the *identical, ultimate* fact question to be decided by a jury in a companion

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States v. *Hoffa*, 349 F.2d 20 (6th Cir. 1965), *aff'd on other grounds*, 385 U.S. 293 (1966) *with United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978); Seventh Circuit: *compare United States* v. *Santos*, 385 F.2d 43 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968) *with United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978); Eighth Circuit: *compare United States* v. *Morton*, 483 F.2d 573 (8th Cir. 1973) *with United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978).

proceeding over which he presides.[26] At no other time, does a trial judge in one proceeding determine under the preponderance of evidence standard the ultimate issue to be decided by a jury in a related or companion case, and then presides over that proceeding. Accordingly, in the limited circumstances when a judge rules on admissibility of hearsay statements of co-conspirators, he must recuse himself from a companion case to assure a fair and impartial trial and, moreover, to prevent the unavoidable appearance of partiality.

In the criminal trial Judge Singleton applied the Fifth Circuit test applicable to the admissibility of co-conspirator hearsay statements as set forth in *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *modified*, 590 F.2d 575, 580-82 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979). Under *James*, the trial court must twice find as a matter of fact that:

1. the alleged conspiracy existed;
2. the alleged co-conspirators were members of that conspiracy; and
3. the hearsay statements were in furtherance of the alleged conspiracy. *Id.*

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[26] For example, on a directed verdict motion, the trial judge must decide only whether plaintiff has presented a *prima facie* case, not whether plaintiff has met its burden by a preponderance of the evidence. Indeed, in the Ninth Circuit, the trial judge merely applies a *prima facie* test in ruling on admissibility of hearsay statements under Rule 801(d)(2)(E). *United States* v. *Rosales*, 584 F.2d 870 (9th Cir. 1978); *United States* v. *Avila-Macias*, 577 F.2d 1384 (9th Cir. 1978); *United States* v. *Testa*, 548 F.2d 847 (9th Cir. 1970). The requirement of *prima facie* proof is less stringent than that of a preponderance of the evidence. The former requires only enough evidence to take the question to the jury, whereas the latter requires "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." McCormick, *Evidence*, 794 (2d ed. 1972).

During the course of the trial, the court is required to make all three fact findings by "substantial, independent evidence." *United States* v. *James, supra,* 590 F.2d at 581.[27] Moreover, at the conclusion of all the evidence, the court must make these same findings on the basis of a "preponderance of the evidence" (*id.* at 582); that is to say, on the basis of the standard burden of proof in all civil cases.

Here, Judge Singleton, in the criminal trial, concluded, on the basis of "a preponderance of the evidence," that a conspiracy existed to fix the price of corrugated containers and that Mead was a participant in that conspiracy. Although the jury acquitted Mead in the criminal case, Mead now finds itself in a *civil* trial before the same judge who previously found against it under the *civil* standard of proof. It is hard to conceive of a situation in which the court's "impartiality might reasonably be questioned" with any greater force than here.

It is precisely to avoid just this type of appearance of partiality that some courts *require* a remanded case to be assigned to a new judge,[28] or adopt a random case assignment procedure to lessen the likelihood that the

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[27] Admissibility of co-conspirator hearsay statements requires, as a preliminary matter, that there be "substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." *United States* v. *Nixon,* 418 U.S. 683, 701 n.14 (1974).

[28] For example, the Seventh Circuit rule provides:

> Whenever a case tried in a district court is remanded by this court for a new trial, it shall be assigned by the district court for trial before a judge other than the judge who heard the prior trial. . . .

Seventh Circuit Rule 18. *See also* Massachusetts District Court Rule 8(i); Rhode Island District Court Rule 7(g).

same judge will preside over the retrial,[29] or recommend recusal whenever a judge would be required to review the evidence of a prior trial conducted by him or to review rulings he made during a prior trial.[30]

Finally, the Fifth Circuit's decision not to disqualify Judge Singleton from presiding over the companion civil case is inconsistent with decisions of other circuit courts of appeals[31] and with another panel decision of the Fifth Circuit.[32] In *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967), the First Circuit disqualified a judge from presiding over a subsequent related proceeding which would have involved his reviewing the correctness of rulings which he made in an earlier proceeding. In ruling that the judge must withdraw from the second evidentiary hearing concerned with the same facts, the

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[29] *See* Connecticut District Court Rule 22; Kansas District Court Rule 27; New York District Court Rule 34 (S.D.N.Y.); New York District Court Rule 2(d)(3) (E.D.N.Y.). *See also*, *United States* v. *Robin*, 553 F.2d 8, 9 n.1 (2d Cir. 1977).

[30] *Holley* v. *Lavine*, 553 F.2d 845, 851 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *United States* v. *Robin*, 553 F.2d 8, 11 (2d Cir. 1978); *United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109-10 (5th Cir. 1974); *Peacock Records, Inc.* v. *Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968); *Halliday* v. *United States*, 380 F.2d 270, 274 (1st Cir. 1967); *United States* v. *Halley*, 240 F.2d 418, 419 (2d Cir.), *cert. denied*, 353 U.S. 967 (1957); *Fred Weber, Inc.* v. *Shell Oil Co.*, No. 75-1115C(2) (E.D. Mo 1976). *See* Wright, *Federal Practice & Procedure: Criminal* § 600 at 631-32 (1969 ed.).

[31] *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967); *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968).

[32] *United States* v. *Womack*, 454 F.2d 1337 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025 (1973).

First Circuit stated that disqualification is even more compelling "when the court is *reweighing factual inferences and credibility*, as distinguished from applying rulings on issues of law." *Id.* at 272-73. (Emphasis added.)

The Second Circuit is in full accord with the First Circuit. In *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968), the Second Circuit held that the danger that a judge will be influenced in a later proceeding by factual findings he made in an earlier one alone requires disqualification, "especially as it minimizes even a suspicion of partiality." *Id.* at 91.[33]

Furthermore, a different panel of the Fifth Circuit has ruled that a judge who has prejudged a defendant's guilt upon evidence he heard in a prior trial must withdraw from a later trial because it demonstrated "personal bias and prejudice." *United States* v. *Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025 (1972).

Since Judge Singleton, in connection with his *James* ruling, found "by a preponderance of the evidence" that appellants had engaged in a national conspiracy to fix prices of corrugated containers, there can be no question that Judge Singleton has predetermined appellants' liability in the companion civil action. Moreover, not only has Judge Singleton expressly concluded that appellants participated in the alleged conspiracy—the ultimate issue to be decided by the jury—but also he made his finding based upon "a preponderance of the evidence" —the legal standard to be applied by the jury in the civil

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[33] *See also United States* v. *Lawrenson*, 334 F.2d 468 (4th Cir. 1964). Judge Thomsen, who was assigned related criminal and civil cases, recused himself upon being presented an affidavit of prejudice in the civil action "for the reason that his participation in the criminal case made it inadvisable for him to try the civil action. . . ." *Id.* at 468.

conspiracy trial. A more exacting predetermination of guilt by a trial judge could not be articulated.

II. Out-of-Court Statements as to the Guilt of Defendants Require Disqualification

The *James* determinations do not stand alone. Shortly after the verdict in the criminal case, Judge Singleton made statements outside of the courtroom which clearly create an appearance of partiality under 28 U.S.C. § 455. Regarding the criminal case, the judge stated, in substance, that there was a lot of incriminating documentary evidence which the government did not use, that the government mishandled the case, that the defendants must be guilty since a number of them had paid a total of about $300 million to settle the civil cases, and that the acquittals were just a quirk.

These out-of-court statements show that Judge Singleton has prejudged not only the evidence, but also the ultimate issue of liability. Such prejudicial statements form an indisputable basis from which the court's "impartiality might reasonably be questioned."

Judge Singleton's reliance on the fact of settlements by a number of defendants is particularly prejudicial to petitioners, which have not settled. Cases are settled for any number of reasons which have nothing to do with guilt or innocence, as the district court itself recognized in another context.[34] Accordingly, the fact of settlement

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[34] Denying a motion by Westvaco to assert a right of contribution against other defendants, the district court said:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable. . . . Even a defend-*

is no evidence of guilt, and Rule 408, Fed. R. Evid., expressly states that evidence of settlement "is not admissible to prove liability for or invalidity of the claim or its amount." [35] Nevertheless, this is exactly what the district court did. Engaging in the rankest form of speculation as to the motives of defendants in settling claims with plaintiffs, the district court simply concluded that they must be guilty and that a nationwide price fixing conspiracy existed.

This is *not* a case of an informed judicial opinion based on matters of record evidence, as the Court of Appeals found. It is, clearly and simply, a personal and uninformed judgment by Judge Singleton as to the guilt of defendants based in part on the fact of settlement. This is precisely the sort of personalized bias or, at the very least, appearance of partiality against which 28 U.S.C. § 455 was aimed. *See United States* v. *Womack*, 454 F.2d 1337 (5th Cir.), *cert. denied*, 414 U.S. 1025 (1972).

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ant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. In re Corrugated Container Antitrust Litigation (Memorandum filed May 30, 1979) (Emphasis added).

This Court has just granted certiorari on the issue of the existence of rights of contribution among antitrust defendants.

[35] *See also Reichenback* v. *Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976); *Lewis* v. *Dixie-Portland Flour Mills, Inc.*, 356 F.2d 54, 56 (6th Cir. 1966); *Paster* v. *Pennsylvania R.R.*, 43 F.2d 908, 911 (2d Cir. 1930) (L. Hand, J.); *Triangle Industries, Inc.* v. *Kennecott Copper Corp.*, 402 F. Supp. 210 (S.D.N.Y. 1975); *Overseas Motors, Inc.* v. *Import Motors Ltd.*, 375 F. Supp. 499, 536-38 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

III. The Record as a Whole Requires Disqualification to Prevent Manifest Unfairness to Petitioners

The cumulative effect of Judge Singleton's rulings in the prior related criminal trial and his out-of-court statements concerning the guilt of defendants in M.D.L. 310 require disqualification under 28 U.S.C. § 455. *See, United States* v. *Ritter*, 540 F.2d 459 (10th Cir.) *cert. denied*, 429 U.S. 951 (1976). In a case in which plaintiffs claim damages in the millions of dollars, defendants are entitled to a trial which is absolutely free of any taint of partiality by the court. A fair trial in a fair tribunal is a basic requirement of due process. Our system of law has always endeavored to prevent even the possibility of unfairness. No less is required here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1980

APPENDIX

APPENDIX A

List of Respondents

Plaintiffs-Appellees-Respondents:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.

Plaintiffs-Appellees-Respondents:

Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.

Plaintiffs-Appellees-Respondents:

The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 79-3369, 79-3653

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

STEERING COMMITTEE, *et al.*,
Plaintiffs-Appellees,
v.
MEAD CORPORATION, *et al.*,
Defendants-Appellants.

IN RE THE MEAD CORPORATION,
Petitioner.

Appeals from the United States District Court
for the Southern District of Texas

On Petition for Writ of Mandamus to the
United States District Court for the
Southern District of Texas

(March 31, 1980)

Before TJOFLAT, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

For the third time this Court is called upon to determine the appropriateness of a trial court ruling in this multidistrict civil antitrust litigation. *See In re Corrugated Container Antitrust Litigation*, 606 F.2d 319 (5th Cir. 1979) (appeal dismissed without published opinion), *petition for cert. filed*, 48 U.S.L.W. 3500 (U.S. Dec. 21, 1979) (No. 79-972) (*Corrugated I*); *In re Corrugated Container Antitrust Litigation*, 611 F.2d 86 (5th Cir. 1980) (*Corrugated II*). As in the other two circumstances, the district court decision—and our consideration of the matter—precedes trial of the litigation, the scope of which defendants appropriately characterize as "gargantuan." The fact that the parties have once more sought the involvement of this Court in the litigation further supports our prediction in *Corrugated II* that "[b]efore the litigation is completed, the case will undoubtedly present numerous opportunities for parties dissatisfied with some aspect of a court ruling to claim entitlement to appellate review." 611 F.2d at 89. The case, not yet tried and far from completion, has apparently already presented those "numerous opportunities." *See also In re Int'l Bus. Machines Corp.*, No. 79-3070, ——F.2d ——, —— n.2, (2d Cir. Feb. 25, 1980) (*IBM*).

The present controversy arises out of the refusal of the district judge, upon motion, to disqualify himself from further participation in the litigation. In No. 79-3369 defendants seek review of the district court's determination on appeal; in No. 79-3653 they request this Court to exercise its power to issue a writ of mandamus. Guided by the principles we found controlling in *Corrugated II*, we dismiss the appeal for want of an appeal-

able order. Further, we deny the request for a writ of mandamus. Alternatively, we hold that under applicable statutory and case law the district judge's refusal to disqualify himself was fully justified.[1]

I. APPEALABILITY: No. 79-3369

In the present situation defendants-appellants urge, as they did in *Corrugated II*, that the district court decision of which they complain is an appealable final order under 28 U.S.C. § 1291 within the meaning of the doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Once again, their reliance on *Cohen* is misplaced.

To determine under the rule of *Cohen* the appealability of a district judge's denial of a motion for disqualification, little discussion beyond that in *Corrugated II* is necessary.[2] Disqualification questions are fully review-

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[1] To dispose of the present matter solely on the issues of appealability and entitlement to a writ of mandamus might put to rest questions concerning the propriety of further involvement in the case by the district judge. Nevertheless, the extraordinary stakes involved (the proposed *partial* settlement totals nearly $300 million, *see* Corrugated II, *supra*, 611 F.2d at 89) and our experience with the progress of the litigation thus far convince us that ultimately appellate consideration of the issue of disqualification will likely be necessary. For those reasons we reach the merits of the contentions raised here. *See* part III, *infra*.

[2] The *Cohen* doctrine should be strictly construed. *North Am. Acceptance Corp. Securities* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 645 (5th Cir. 1979); *see Litton Systems, Inc.* v. *Southwestern Bell Tel. Co.*, 539 F.2d 418, 425 (5th Cir. 1976); *Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 535 F.2d 1010, 1014 (7th Cir. 1976); *International Bus. Mach. Corp.* v. *United States*, 480 F.2d 293, 298 (2d Cir. 1973) (en banc), *cert. denied*, 416 U.S. 979,

able on appeal from final judgment. *Davis* v. *Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3553 at 384; *see, e.g.*, *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1107-15 (5th Cir. 1980); *United States* v. *Clark*, 605 F.2d 939, 941-42 (5th Cir. 1979); *Whitehurst* v. *Wright*, 592 F.2d 834, 837-38 (5th Cir. 1979); *King* v. *United States*, 576 F.2d 432, 436-37 (2d Cir.), *cert. denied*, 439 U.S. 850, 99 S.Ct. 155 (1978); *United States ex rel. Weinberger* v. *Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977); *United States* v. *Partin*, 552 F.2d 621, 636-40 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). Precisely *because* disqualification issues are reviewable following entry of judgment, as a threshold matter the *Cohen* doctrine is unavailing. In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978), the Supreme Court explained that, as a prerequisite to appealability under the *Cohen* rule, "the order must . . . be effectively unreviewable on appeal from a final judgment." *See Corrugated*

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94 S.Ct. 2413, 40 L.Ed.2d 776 (1974); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). . . . [I]t is important to remember that "we must be parsimonious in our analysis of appealability." *North Am. Acceptance Corp. Securities, supra*, 593 F.2d at 645. We emphasize that we must consider "the hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation . . .." *Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1094 (5th Cir. 1977).

611 F.2d at 89. In *Ruiz* v. *Estelle*, 609 F.2d 118, 119 (5th Cir. 1980), this Court noted the recent tendency of appellate courts "toward less interlocutory cossetting."

II, supra, 611 F.2d at 88; *Ruiz* v. *Estelle*, 609 F.2d 118, 119 (5th Cir. 1980).[3]

II. MANDAMUS: No. 79-3653

In addition to their claim that the decision of the district court is immediately appealable under the *Cohen* doctrine, defendants "out of an abundance of caution" also petition for a writ of mandamus. The contention does not merit extended discussion. We refuse issuance of the writ.[4]

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[3] Defendants urge that in light of the complex nature of the case only immediate review of the district judge's decision will be effective. *Potashnick* v. *Port City Constr. Co., supra*, refutes that contention. In *Potashnick*, this Court examined disqualification issues on appeal from final judgment. Although trial of the case lasted thirty-three days and "spawned" a record of twenty-five volumes, the parties received complete review of the matter. 609 F.2d at 1104, 1107-15.

Our determination that questions concerning disqualification of judges are not immediately appealable under *Cohen* is fully consistent with decisions of other courts. *See United States* v. *State of Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978); *Scarrella* v. *Midwest Fed'l Savings & Loan*, 536 F.2d 1207, 1210 (8th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976); *Robinson* v. *Largent*, 419 F.2d 1327, 1327 (3d Cir. 1970); *Dubnoff* v. *Goldstein*, 385 F.2d 717, 721 (2d Cir. 1967); *Rosen* v. *Sugarman*, 357 F.2d 794, 796 (2d Cir. 1966); 13 Wright, Miller & Cooper, *supra*, § 3553 at 385.

[4] We do not deny our authority to review on mandamus the question of disqualification. Courts not infrequently reach the merits of disqualification issues on a consideration of whether mandamus will issue. *Davis* v. *Board of School Comm'rs, supra*, 517 F.2d at 1051-52; *see IBM, supra*, —— F.2d —, at ——-——; *Bell* v. *Chandler*, 569 F.2d 556, 559-60 (10th Cir. 1978); *United States* v. *Ritter*, 540 F.2d 459, 460-65 (10th Cir.), *cert. denied*, 429 U.S. 951, 97 S.Ct. 370,

As this Court recently stated in *United States* v. *Denson*, 603 F.2d 1143 (5th Cir. 1979) (en banc), "Countless expressions can be found in the jurisprudence to support the black-letter proposition that mandamus is an extraordinary remedy for extraordinary causes." 603 F.2d at 1146. "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify this extraordinary remedy." *Will* v. *United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967). Moreover, "[t]he Supreme Court has repeatedly stated . . . that issuance of a writ of mandamus lies in large part within the discretion of the court." *United States* v. *Denson*, *supra*, 603 F.2d at 1146; *see Helstoski* v. *Meanor*, 442 U.S. 500, 504, 99 S.Ct. 2445, 2447, 61 L.Ed.2d 30, 35 (1979) [*quoting Kerr* v. *United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed. 2d 725 (1976)]. In the present case we decline to exercise our discretion to issue the writ and we do so without need of a comprehensive examination of the record.

For nearly one hundred years, it has been clear that "'[t]he general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.*'" *Helstoski* v. *Meanor*, *supra*, 442 U.S. at 505,

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50 L.Ed.2d 319 (1976); *In re Rodgers*, 537 F.2d 1196, 1197-98 (4th Cir. 1976); *Scarrella* v. *Midwest Fed'l Savings & Loan*, *supra*, 536 F.2d at 1210; *Pfizer, Inc.* v. *Lord*, 456 F.2d 532, 536-44 (8th Cir.), *cert. denied*, 406 U.S. 976, 92 S.Ct. 2411, 32 L.Ed.2d 676 (1972); *Rosen* v. *Sugarman*, *supra*, 357 F.2d at 796-800; *In re Union Leader Corp.*, 292 F.2d 381, 383-92 (1st Cir.), *cert. denied*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); *Henry* v. *Speer*, 201 F. 869, 870-72 (5th Cir. 1913). Moreover, in exceptional circumstances the writ will lie. *See Bell* v. *Chandler*, *supra*, 569 F.2d at 560; *United States* v. *Ritter*, *supra*, 540 F.2d at 464-65; *In re Rodgers*, *supra*, 537 F.2d at 1198.

99 S.Ct. at 2448, 61 L.Ed.2d at 35 [*quoting Ex parte Rowland*, 104 U.S. 604, 617, 26 L.Ed. 861 (1882) (emphasis added by the court)]. "[A]s a general rule 'appellate review should be postponed . . . until after final judgment . . . .' *Will* v. *United States*, *supra*, 389 U.S. at 96 [88 S.Ct. at ——]; *Parr* v. *United States*, 351 U.S. 513, 520-21 [76 S.Ct. 912, 917, 100 L.Ed. 1377] (1956). . . . [T]he party seeking issuance of the writ [of mandamus must] have no other adequate means to attain the relief he desires . . . ." *Kerr* v. *United States District Court*, *supra*, 426 U.S. at 403, 96 S.Ct. at 2124. As discussed above, full review awaits these defendants upon appeal from final judgment.

On this ground alone we refuse to issue the writ. Additionally, however, we note that the writ of mandamus "is an order directing a public official . . . to perform a duty exacted by law," *United States* v. *Denson*, *supra*, 603 F.2d at 1146, and "will not issue to correct a duty that is to any degree debatable . . . ." *Id.* at 1147 n.2. The party seeking the writ carries the burden of proving a "clear and indisputable" right to issuance of the writ. *Kerr* v. *United States District Court*, *supra*, 426 U.S. at 403, 96 S.Ct. at 2124; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953). As will become clear in the discussion that follows, defendants manifestly cannot demonstrate a "clear and indisputable" right to issuance of the writ. The legal duty of the district judge to disqualify himself is not merely debatable—it is nonexistent.

III. DISQUALIFICATION—THE MERITS [5]

Mead, Westvaco, Georgia-Pacific, and Crown Zellerbach, appellants-petitioners here, as manufacturers of corrugated containers and corrugated sheets, are defend-

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[5] *See* note 1, *supra*, and accompanying text.

ants in one or more of forty-four class actions and eleven non-class civil actions consolidated for pretrial proceedings [6] in the United States District Court for the Southern District of Texas and assigned to the Honorable John V. Singleton, Jr., now chief judge of that district.[7] These four parties are among the few remaining that have not settled out of the litigation.

Extensive scrutiny of the corrugated container industry gave rise to the massive litigation of which a relatively narrow controversy is herein considered. A two-year grand jury investigation of the industry resulted in criminal felony indictments against nine individuals and nine corporations, including Mead, and misdemeanor indictments against an additional seventeen individuals and five corporations. Defendants Westvaco, Georgia-Pacific, and Crown Zellerbach were not indicted. Judge Singleton, after having stayed further proceedings in the civil litigation, presided over the criminal trials of those indicted defendants who elected to stand trial. A jury acquitted the criminal defendants of all charges on April 27, 1979. On August 30, 1979, Mead filed an affidavit of bias and motion requesting Judge Singleton to recuse himself from further presiding over the civil litigation. The motion was denied.

Defendants challenge Judge Singleton's decision and ask this Court to find Judge Singleton disqualified under the applicable legal standards.[8] First, they contend that

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[6] The cases were consolidated under the caption *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) pursuant to 28 U.S.C. § 1407. *In re Corrugated Container Antitrust Litigation*, 441 F.Supp. 921, 924 (Jud.Pan. Mult.Lit. 1977).

[7] *Id.*

[8] The relevant statutory provisions governing disqualification of federal judges are 28 U.S.C. §§ 144, 455.

[Footnote continued on page B-9]

because of evidentiary findings made in the criminal trial disqualification requirements have been met. Second, they urge that certain out-of-court statements made by

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[8] [Continued]

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . .. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > * * * * * *
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification

28 U.S.C. § 455 (as amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, tit. II § 214(a), (b), tit. IV § 402(c), 92 Stat. 2661, 2682).

Judge Singleton following the criminal trial were of such a nature to require his disqualification. Third, defendants maintain that alleged out-of-court statements of Judge Singleton's law clerk and an interview with an industry magazine that she gave reflect on Judge Singleton in a manner that requires his disqualification. Each of the contentions fails.[9] Judge Singleton most appropriately refused to recuse himself.

A. *Evidentiary Rulings*

Defendants' main contention that Judge Singleton is disqualified from presiding further in the civil litigation rests upon his making of evidentiary rulings during the

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[9] Westvaco, Georgia-Pacific, and Crown Zellerbach also urge that Judge Singleton's handling of the Mead motion constitutes another reason for this Court to hold him disqualified from presiding further in the litigation. The specifics of the complaints will be detailed below but comment on one is appropriate here. Defendants argue that to some extent Judge Singleton's failure to refer Mead's motion for recusal to another district judge "placed him[] in an adversary position vis-a-vis . . . the moving parties and by doing so accentuated . . . the appearance of judicial partiality." The contention completely lacks merit. No case referred to by defendants or located in an exhaustive search of the authority suggests any negative inference that can be drawn from the fact that the judge to whom a motion to recuse is directed rules on the motion. "[I]t is for the judge who is the object of the affidavit [of bias] to pass on its sufficiency." 13 Wright, Miller & Cooper, *supra*, § 3551 at 375. "[W]hile the statute undoubtedly permits referring the disposition of an affidavit of bias to another judge, . . . the adoption of such a procedure as a general rule would be unwise." *United States* v. *Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979) (citation omitted); *see United States* v. *Olander*, 584 F.2d 876, 883 (9th Cir. 1978); *In re Union Leader Corp.*, *supra*, 292 F.2d at 384.

course of the criminal trial in which Mead was involved. Pursuant to responsibilities imposed upon him by *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *modified*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), Judge Singleton made factual findings as a predicate to the jury's evidentiary consideration of out-of-court statements made by an alleged coconspirator.[10] Defendants urge, that, because Judge Singleton made the findings,[11] he is disqualified from presiding in the future over proceedings in the civil litigation. We disagree.

No court has yet faced the precise issue presented here—the effect of *James* rulings upon the legal propriety of a judge presiding over subsequent related proceedings. The issue, however, is not generically novel. We

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[10] Before admitting the statements of the alleged coconspirator as evidence Judge Singleton found " '*substantial, independent* evidence of a conspiracy' " and of the criminal defendants' participation in that conspiracy. *See United States* v. *James, supra*, 590 F.2d at 581 [quoting *United States* v. *Nixon*, 418 U.S. 683, 701 n.14, 94 S.Ct. 3090, 3104 n.14, 41 L.Ed.2d 1039 (1974) (emphasis added by the *James* court)]. At the close of the evidence, before he permitted the jury to consider the statements in its deliberations, Judge Singleton made the second of the *James* findings—that a preponderance of the evidence supported the conclusion that the conspiracy existed, that the defendants and the out-of-court declarant were coconspirators, and that the statemens were made in furherance of the conspiracy. *See United States* v. *James, supra*, 590 F.2d at 582.

[11] Defendants argue that disqualification follows not because of the substance of Judge Singleton's *James* findings but rather because he was required by *James* to make the determinations. "Though not in agreement with [the] *James* rulings in the criminal case, defendants do not question or complain about those adverse rulings here."

believe this situation not unlike countless others in which district judges become thoroughly immersed in all aspects of a case, rule on the admissibility of evidence and on its sufficiency to permit a jury to determine the litigation's outcome, and even form conclusions on ultimate facts involved and then later preside at trials involving the same facts and/or the same parties. As long as judges are not disqualified under these circumstances—and overwhelming authority indicates that they are not [12]—we have no difficulty in holding that Judge Singleton's *James* rulings in the criminal trial do not require his disqualification.

It is established beyond dispute that under Section 144 [13] only allegations of "personal" bias of a judge are sufficient to require disqualification. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 582-83, 86 S.Ct. 1698, 1709-10, 16 L.Ed.2d 778 (1966); *Berger* v. *United States*, 255 U.S. 22, 32-33, 41 S.Ct. 230, 232-233, 65 L.Ed. 481 (1921); *United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979). Moreover, for a bias to be personal, and

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[12] *See, e.g., United States* v. *Clark, supra*, 605 F.2d at 941-42; *Rice* v. *McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978); *Weber* v. *Garza*, 570 F.2d 511, 512 n.1 (5th Cir. 1978); *United States* v. *Wolfson*, 558 F.2d 59, 62-64 (2d Cir. 1977); *United States* v. *Archbold-Newball*, 554 F.2d 665, 681-82 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977); *United States* v. *Partin, supra*, 552 F.2d at 637-39; *United States* v. *Cowden*, 545 F.2d 257, 265-66 (1st Cir. 1976), *cert. denied*, 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed. 2d 585 (1977); *United States* v. *Harris*, 542 F.2d 1283, 1303-04 (7th Cir. 1976), *cert. denied*, 430 U.S. 934, 97 S.Ct. 1558, 51 L.Ed.2d 779 (1977); *United States* v. *Jeffers*, 532 F.2d 1101, 1111-12 (7th Cir. 1976), *aff'd in part, vacated in part*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168, *rehearing denied*, 434 U.S. 880, 98 S.Ct. 241, 54 L.Ed.2d 164 (1977); 13 Wright, Miller & Cooper, *supra*, § 3549 (1979 Supp. at 269).

[13] *See* note 8, *supra*.

therefore disqualifying, it "must stem from an extrajudicial source . . . ." *United States* v. *Grinnell Corp., supra,* 384 U.S. at 583, 86 S.Ct. at 1710; *Berger* v. *United States, supra,* 255 U.S. at 31, 41 S.Ct. at 232; *IBM, supra,* —— F.2d at ——, slip op. at 1417; *see United States* v. *Serrano, supra,* 607 F.2d at 1150; *United States* v. *Clark, supra,* 605 F.2d at 942; *Davis* v. *Board of School Comm'rs, supra,* 517 F.2d at 1051. In the present case there can be no question but that the *James* rulings in the criminal case were judicial in nature. While defendants suggest that the rulings were not correct,[14] they do not hint that the rulings were in the slightest degree based upon anything other than evidence appropriately before Judge Singleton in a situation as fully judicial as any imaginable. Rather, defendants rely on the 1974 amendment to Section 455. Section 455(a)[15] now requires for disqualification only that a judge's "impartiality might reasonably be questioned." Defendants urge that, because Judge Singleton made the *James* rulings and because Section 455(a) does not refer to personal, extrajudicial bias, that provision requires Judge Singleton's disqualification. Defendants, however, misunderstand Section 455(a).

This Court in *Davis* v. *Board of School Comm'rs, supra,* specifically held that even after the 1974 amendment to Section 455 the disqualification statutes remain to guard against personal, extrajudicial bias or the appearance of partiality arising out of such bias.

> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct

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[14] *See* note 11, *supra.*

[15] *See* note 8, *supra.*

> which shows bias or prejudice or lack of impartiality . . [,] conduct extra-judicial in nature as distinguished from conduct within a judicial context. This means that *we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.*

517 F.2d at 1052 (emphasis added).[16] Since *Davis*, other courts have enunciated the rule that Sections 144 and 455(a) reach the same sort of conduct. *IBM*, *supra*, —— F.2d at ——; *United States* v. *Olander*, *supra*, 584 F.2d at 882; *United States* v. *Haldeman*, 181 U.S.App.D.C. 254, 356 n.297, 559 F.2d 31, 133 n.297 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 437 F.Supp. 230, 233 (D.Hawaii), *appeal dismissed*, 564 F.2d 1343, 1347 (9th Cir. 1977); *see King* v. *United States*, *supra*, 576 F.2d at 437. Moreover, in numerous cases since the enactment of Section 455(a) courts have held that familiarity with defendants and/or the facts of a case that arises from earlier participation in judicial proceedings is not sufficient to disqualify a judge from presiding at a later trial.[17]

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[16] The *Davis* court, however, recognized an exception to the requirement where the circumstances are of such an extreme nature that the judicial conduct demonstrates "pervasive" bias and prejudice. 517 F.2d at 1051; *see Whitehurst* v. *Wright*, *supra*, 592 F.2d at 838; *United States* v. *Wolfson*, *supra*, 558 F.2d at 63. Indeed, such aggravated circumstances have arisen. *See Nicodemus* v. *Chrysler Corp.*, 596 F.2d 152, 155-56 (6th Cir. 1979); *Bell* v. *Chandler*, *supra*, 569 F.2d at 559-60.

[17] *See* authorities cited note 12, *supra*; *see also Meeropol* v. *Nizer*, 429 U.S. 1337, 1338 n.2, 97 S.Ct. 687, 689 n.2, 50 L.Ed. 2d 729 (Marshall, Circuit Justice, 1977); *United States* v. *Montecalvo, on rehearing*, 545 F.2d 684, 685 (9th Cir. 1976),

We have long disclaimed any notion of " 'no-deposit/ no-return judges, disposable after one use' ". *United States* v. *Partin, supra,* 552 F.2d at 637 n.20 [*quoting United States* v. *Harris,* 458 F.2d 670, 678 (5th Cir.),

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cert. denied, 431 U.S. 918, 97 S.Ct. 2184, 53 L.Ed.2d 229 (1977); *United States* v. *Dodge,* 538 F.2d 770, 782 (8th Cir. 1976), *cert. denied,* 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 547 (1977); *United States* v. *Bernstein,* 533 F.2d 775, 784-85 (2d Cir. 1976), *cert. denied,* 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1977).

The Second Circuit, applying the same standards that govern here, stated in *United States* v. *Wolfson, supra,* that "a defendant who has undergone two lengthy trials before the same judge, both of which ended in guilty convictions, may come to consider that judge as biased against him. These suspicions are understandable, but . . . they do not provide a reasonable basis for questioning a judge's impartiality." 558 F.2d at 64. Similarly, in *United States* v. *Partin, supra,* this Court held that a judge who had presided over six separate trials arising from one indictment was not disqualified from presiding at a retrial of two defendants following an appellate reversal. 552 F.2d at 636, 639. In *Partin,* we rejected a *per se* rule against a district court judge's retrying a case after mistrial or reversal. "[S]uch a rule is not the sine qua non for either the substance or the *appearance* of justice. . . . Altogether, we see little to commend such a rule . . .." *Id.* at 639 (emphasis added). Finally, in *United States* v. *Archbold-Newball, supra,* we held a district judge's comments at defendants' bail hearing not to disqualify him from trying the defendants. The judge's statements were to the effect that (1) he had, on the basis of three earlier trials, concluded that a conspiracy did exist; (2) he would consider the earlier trials; (3) he believed a D.E.A. agent involved in the case to be a credible witness; and (4) he thought that there was abundant additional evidence of the defendants' membership in what he described as a "large-scale conspiracy composed of the most vicious individuals that this court has ever seen." 554 F.2d at 681-82.

cert. denied, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972)]; *see United States* v. *Archbold-Newball*, *supra*, 554 F.2d at 682. We do so again. Judge Singleton's *James* rulings in the criminal trial are not sufficient to cause a reasonable third party to question his impartiality in the civil litigation. Nothing to which defendants point suggests anything but a "reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court." *United States* v. *Ritter*, *supra*, 540 F.2d at 464.[18]

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[18] The legislative history to Section 455(a) indicates that:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R.Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong. & Admin.News, pp. 6351, 6355 (emphasis in original).

Despite defendants' contention that their argument rests on the fact of the *James* rulings rather than on the substance of those rulings, *see* note 11, *supra*, we are highly skeptical that if Judge Singleton's *James* findings had been different, any question of his disqualification would have been raised—at least by defendants. To that extent, defendants are "seeking to avoid the consequences of [an] expected adverse decision." H.R.Rep. No. 1453, *supra*, at 6355.

B. *Judge Singleton's Out-of-Court Comments*

The second ground on which defendants urge the disqualification of Judge Singleton involves a conversation between him and an attorney for one of the acquitted criminal defendants shortly after completion of the criminal trial. The allegations concerning the conversation are contained in affidavits by two attorneys for Mead.[19] In essence, they state that, on the day after

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[19] Harold F. Baker, attorney for Mead, filed an affidavit in support of Mead's "motion for Judge Singleton to recuse himself" on August 29, 1979. On September 14, 1979, Robert L. Green, another Mead attorney, filed an affidavit in support of a motion for Judge Singleton to reconsider his denial of the original motion.

In pertinent part, Mr. Baker's affidavit states as follows:

> On or about June 14, 1979, I had a telephone conversation with Mr. William Maddux, who represented . . . a misdemeanor defendant [] in the trial of the criminal case. During that conversation, Mr. Maddux confirmed to me that he and Judge Singleton played golf on April 28, 1979, the day after the jury verdict acquitting the eight remaining defendants in the criminal case. Mr. Maddux stated that on this occasion Judge Singleton told Mr. Maddux in substance that there was a lot of incriminating evidence in the document depository which the government did not use and that the government mishandled the case against the defendants. Furthermore, Mr. Maddux stated to me that Judge Singleton told him in substance that the civil defendants must be guilty or they would not have paid $300 million to settle the civil corrugated class action suit.

With respect to the conversation, Mr. Green's affidavit states:

> On June 8, 1979, I had a telephone conversation with William Maddux, an attorney who represented Mr. Numan Garrison, a misdemeanor defendant in the trial of the criminal case. I telephoned Mr. Maddux solely to ask

the jury in the criminal trial acquitted the defendants, Judge Singleton played golf with William Maddux, an attorney for one of the misdemeanor defendants. On that date, according to the affidavits, Judge Singleton stated that the government had mishandled the prosecution and had left incriminating evidence unused in the document depository. Moreover, Judge Singleton was alleged to have stated that the civil plaintiffs would not make the mistakes that the government had made and that the civil defendants would not have paid $300 million to settle the lawsuit unless they were guilty.

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him to send me certain exhibits which he had introduced in the criminal case, copies of which I did not have.

During the course of my conversation with Mr. Maddux, Mr. Maddux stated to me, without any question from, or suggestion by me, that Judge Singleton had made a number of statements about the civil corrugated container litigation. Maddox quoted Judge Singleton as having stated that the acquittals were just a quirk because the government had much more damaging evidence it could have introduced but that the jury did not hear.

Mr. Maddux also quoted Judge Singleton as having stated that the lawyers for the civil plaintiffs are sharp and that the evidence which was not introduced in the criminal case would come out in the civil cases.

Mr. Maddux further stated that Judge Singleton made it clear to him that there was no question in the Judge's mind concerning the criminal defendants' guilt and that the Judge blamed the verdict on the inadequacy of the government attorneys.

Mr. Maddux also quoted Judge Singleton as stating that the defendants must be guilty since they paid $300 million in settlements because smart people did not pay that kind of money unless there was more evidence than what the jury in the criminal case heard.

As we are required to do, we accept as true the allegations contained in the affidavits. *Berger* v. *United States*, *supra*, 255 U.S. at 36, 41 S.Ct. at 234; *United States* v. *Serrano*, *supra*, 607 F.2d at 1150; *Davis* v. *Board of School Comm'rs*, *supra*, 517 F.2d at 1051; 13 Wright, Miller & Cooper, *supra*, § 3551 at 381. The allegations, however, are insufficient to require Judge Singleton's disqualification.

The affidavits do not suggest any personal, extrajudicial bias; nor does a question of Judge Singleton's impartiality arise because of the danger of such bias. Taken as alleged by the defendants, all of the statements reflect comments on the evidence and, at most, opinions developed through Judge Singleton's participation in the case. As in *United States* v. *Haldeman*, *supra*, "while these thoughts were voiced in an extrajudicial setting . . . the informational source upon which they drew—the judge's experience as a judge—was distinctly judicial." 181 U.S.App.D.C. at 359, 559 F.2d at 136. Such statements are not improper and do not require Judge Singleton's disqualification. *See United States* v. *Clark*, *supra*, 605 F.2d at 942; *United States* v. *Haldeman*, *supra*, 181 U.S.App.D.C. at 359, 559 F.2d at 136; *United States* v. *Montecalvo*, *supra*, 545 F.2d at 685; *United States* v. *Bernstein*, *supra*, 533 F.2d at 785.

C. *Actions of Judge Singleton's Law Clerk*

Defendants' final contention that Judge Singleton is disqualified from presiding further in the litigation is derivative in nature. Defendants assert that the conduct of Judge Singleton's law clerk necessitates his disqualification.[20] Since this Court has held that ordinarily a

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[20] Baker's affidavit filed in support of this contention states that:

[Footnote continued on page B-20]

[20] [Continued]

It is my understanding that Judge Singleton's law clerk . . . was hired specifically to assist Judge Singleton in the criminal corrugated cases and the related civil corrugated cases.

[The clerk] on or about May 9, 1979, shortly after the not guilty verdicts were returned April 27, 1979, told an attorney representing Mead in substance that defendants did not deserve to win the criminal trial and that plaintiffs' counsel in the civil cases would do a better job than the government counsel did in the criminal cases.

At some time prior to June 6, 1979, [she] was reportedly interviewed by, or talked to a representative of, a trade magazine for purchasing agents, a group which includes employees of the named plaintiffs and class members in the pending corrugated container proceedings. [The clerk] was quoted in *Purchasing* magazine, published on June 6, 1979, as saying that "Industrial buyers may choose not to participate in the settlement and press their own suit, seeking higher payment. If a large number of companies decide to file their own suits, then the amount left of the $295 million for the others will be higher." . . . The statements attributed to [her] in this trade magazine constitute a recommendation (or may be reasonably so interpreted) that purchasers of corrugated containers opt out of the classes established for settlement and file their own suits. These statements . . . are particularly prejudicial in light of [her] expressed, and I believe well known, bias against defendants . . .. Her statements could have a substantial adverse impact on the ultimate dollar liability of Mead and defendants generally in this civil litigation. This is especially so since notices to the class are now being prepared and will, in the normal course of events, be sent to prospective class members.

The law clerk's statements to counsel outside the courtroom, her interview and the substance of her remarks, I believe, constitute bias on her part and taint the appearance of impartiality required of Judge Singleton and his

judge's bias, to be disqualifying, must run to a party rather than merely to the attorney, *Davis* v. *Board of School Comm'rs, supra,* 517 F.2d at 1050-51, we think it fitting to restrict those situations in which the bias of a law clerk will work to disqualify the clerk's employer. Clearly, a law clerk's views cannot be attributed to the judge for whom the clerk works. Moreover, even if law clerks' opinions accurately reflected the views of their employers, we could not hold Judge Singleton disqualified in the present case because of actions and statements attributed to his law clerk.

Defendants allege that the law clerk voiced her opinions on the resolution of the criminal case to one of Mead's lawyers. Setting aside questions, of which we have many, of the propriety of such comments, they are clearly based upon her observations made in connection with the case. If Judge Singelton cannot be found disqualified for opinions he developed in the course of the litigation, it is difficult to comprehend how he could be found disqualified because of the opinions his law clerk developed in a judicial setting.

The law clerk also allegedly gave a press interview and, of course, defendants also urge that as a ground for the disqualification. In giving an interview with the press, the clerk most likely breached duties imposed upon her by Canons 3 A(6),[21] *see United States* v. *Haldeman,*

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law clerk in this massive pending litigation. Whether or not Judge Singleton assented to the interview or whether or not [her] public statements reflect the judge's viewpoints, her comments raise serious questions concerning the appearance of this Court's impartiality in these civil corrugated container proceedings.

[21] Canon 3A(6) provides:

A judge should abstain from public comment about a pending or impending proceeding in any court, and

supra, 181 U.S.App.D.C. at 357, 559 F.2d at 134, and 3 B(2),[22] of the Code of Judicial Conduct for United States Judges. Nevertheless, the statements attributed to the clerk constitute no basis for disqualification of Judge Singleton. Indeed the statements express no opinion whatsoever. Rather, they merely state obvious fact: if fewer members of the class elect to participate in the settlement, each claimant's share will increase. There is no basis on which Judge Singleton should be disqualified.

No. 79-3369—APPEAL DISMISSED.

No. 79-3653—WRIT OF MANDAMUS DENIED.

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should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

[22] Canon 3 B(2) provides:

A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MDL No. 310

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

MEMORANDUM AND ORDER

The Mead Corporation, a defendant in these cases,[1] has on August 29, 1979, filed a motion requesting that the court recuse itself from this litigation. Three other defendants, Crown Zellerbach, Georgia-Pacific, and Westvaco,[2] have now joined in the motion. Because this mo-

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[1] Mead is a plaintiff in two of the cases conditionally transferred to this court. In one, it seeks to continue its efforts to establish a right to claim contribution from other defendants in the main litigation in the event liability is established against it, *Mead Corp.* v. *Alton Box Board Co., et al.*; in the other it seeks injunctive and declaratory relief against plaintiffs who filed a claim similar to the claims in the main litigation but under California state law, *Alton Box Board Co., et al.* v. *Esprit de Corps.*

[2] These three defendants were not indicted and took no part in the criminal proceedings.

tion is addressed to a claimed personal bias, I consider it proper to answer it in the first person.

Mead seeks my disqualification under two statutes, 28 U.S.C. § 144 and 28 U.S.C. § 455. These statutes read, in relevant part, as follows:

> Section 144:
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."
>
> Section 455 provides:
>
> "(a) Any justice, judge, magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

As the Fifth Circuit has recognized, the test is the same under both, a reasonable factual basis—reasonable man test. *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975). Case law makes it clear that the trial judge is to determine the legal sufficiency of the affidavit, although for that purpose he accepts the factual allegations as true. *Berger* v. *United States*, 255 U.S. 22 (1921).

The bias or prejudice must be "personal"—"an attitude of extrajudicial origin, derived non coram judice. . . . The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind . . .) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him." *Craven* v. *United States*, 22 F.2d 605, 607-08 (1st Cir.), *cert. denied*, 276 U.S. 627 (1927). Opinions formed by judges in the course of presiding over prior related proceedings have consistently been held not to constitute grounds for disqualification. Citing only recent Fifth Circuit cases, we have *United States* v. *Archbold-Newball*, 554 F.2d 665, 681-82, (5th Cir. 1977); *United States* v. *Partin*, 522 F.2d 621, 636-39 (5th Cir. 1977); *United States* v. *Sutherland*, 463 F.2d 641, 650 (5th Cir. 1972). An expression of belief in a defendant's guilt is not in itself grounds for disqualification. *United States* v. *Bolden*, 355 F.2d 453 (7th Cir.), *cert. denied*, 384 U.S. 1012 (1965); *United States* v. *Sutherland*, *supra*. All of these cases, and the many, many others which this court has consulted on the question of recusation, support my belief that the allegations contained in the motion and affidavits are insufficient as a matter of law to raise in any reasonable person's mind a belief that I am prejudiced against Mead, or any other litigant in this case, or that the rulings I have made and may make in the future will be motivated by any other desire than the desire to provide equal justice under the law.

The gist of Mead's motion is that during the trial of Mead and others on charges of illegally conspiring to fix prices in the corrugated container industry I formed an opinion as to Mead's guilt which renders me unable to preside impartially over this related litigation. Grounds for the motion are (1) the evidentiary findings required to be made by me by *James*[3] in the course of the trial of those indicted; (2) a conversation I had with an attorney for one of the individuals tried and acquitted in those proceedings; and (3) two statements alleged to have been made by my law clerk.

Mead has known since the indictments were returned in January of 1978 that I was going to preside over both the criminal trial and the civil proceedings, which had been transferred to me by the Judicial Panel on Multidistrict Litigation on November 29, 1977, pursuant to 28 U.S.C. § 1407. The fact that I would have to make evidentiary rulings of the type of which Mead now complains must surely have been known to its counsel; indeed, the form which the *James* findings would take was the subject of hours of discussion in the proceedings involving those indicted. Mead does not complain of any prejudice to it during the three-and-a-half month trial; indeed it could hardly do so. Mead was permitted, over strenuous government objection, to present a lengthy defense based on its antitrust compliance program, a defense which has never before been held to constitute a defense to price fixing or to the criminal intent of a corporation. The court embodied that defense in its instructions to the jury. (The relevant portion of the jury charge is attached to this opinion as Exhibit A.) The jury returned a unanimous verdict of acquittal after less than one day's deliberations. No animus on my part could be alleged against Attorney Baker, who filed the motion and affidavit. In fact, until this motion was filed I firmly be-

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[3] *United States* v. *James*, 590 F.2d 575 (5th Cir. 1979).

lieved him to be house counsel for Mead and not counsel of record. I was surprised to learn that he is a member of a prestigious Washington, D.C. law firm. Throughout the proceedings in both this litigation and the trial of those indicted, I have allowed Attorney Baker to address me on any point he desired, and I believe I have always been courteous and fair to him.

Neither does Mead allege that any rulings in the civil litigation have been affected by my supposed "prejudice" against any party. Some rulings in this case have been in favor of one group of litigants, some of another, as must be true in any normal litigation. In the comparatively recent past, I have denied the motion of non-settling defendants (among them Mead and the three other defendants joining in this motion) for leave to amend their answers to assert claims for contribution against the settling defendants, who now comprise approximately 80% of the market and who have agreed to pay almost $300 million to the plaintiffs' class. That ruling, which followed the great weight of federal case law, was certified as a final ruling under Rule 54, Fed. R. Civ. P., to enable movants to appeal promptly and have the question settled by the Court of Appeals. Other recent rulings as to discovery, such as access by plaintiffs to grand jury materials and the scope of discovery, can be construed as favorable to Mead and the other non-settling defendants.

Mead's motion and accompanying affidavits clearly do not present grounds for recusation by establishing either actual prejudice or a reasonable appearance of prejudice. If such a serious motion can ever be termed frivolous, this motion can indeed be so labeled. Presiding over the pretrial aspects of this massive litigation has not been a sinecure. I have no personal interest in continuing to preside; however, in my thirteen years on the bench I have never avoided doing my judicial duty because it was

complicated, burdensome, or unpleasant, and I do not intend to do so now.

I will speak briefly about the three grounds Mead suggests for its motion. *United States* v. *James*, 590 F.2d (5th Cir. 1979), requires a trial court, before admitting coconspirator hearsay under Rule 801(d)(2)(E), Fed. R. Evid., to determine on the record and by a preponderance of the evidence that a conspiracy existed and that both the defendant against whom it is admitted and the declarant were members of the conspiracy. The problems raised by Rule 801(d)(2)(E) have been handled somewhat differently by different circuits, but all require some determination by either a court or jury of the critical issues of existence of, and participation in, a conspiracy before considering coconspiracy hearsay. In this circuit under *United States* v. *Apollo*[4] which was the controlling law in this circuit during the trial of those indicted, it was the jury who performed this function—a very difficult task for laymen in most cases and, in the long complicated multi-defendant case in question, probably an impossible one. The *James* rule is clearly more sensible and more protective of the defendant than the *Apollo* rule and was the approach taken by me in that trial. Any suggestion that the *James* rule makes it impossible, for example, for the same judge impartially to retry a case which has been reversed and remanded to him would be as absurd from the standpoint of judicial administration as a suggestion that a judge who rules on the suppression of illegally obtained evidence cannot impartially try the case from which he has excluded it. A *fortiori*, where the second trial is a civil case, involving different evidence, somewhat different allegations, different parties and many different issues, the *James* determination standing alone cannot require assignment to a new judge to insure impartiality to a defendant.

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[4] 476 F.2d 156 (5th Cir. 1973).

Mead cites as its second instance of prejudice a conversation between Mr. William Maddux and myself. The conversation did take place, and arose as follows: Mr. Maddux is a Chicago attorney who represented Mr. Numan Garrison, one of the acquitted defendants. A friend of mine informed me that Mr. Maddux would like to play golf with me after the trial was over. I invited Mr. Maddux at the conclusion of the trial to play golf with me. Under the circumstances, our conversation naturally centered around the trial which had taken the lion's share of our time for the past several months. During that conversation my recollection is that I did say that I considered it odd that counsel for the United States should have tried a case of that nature and that magnitude with virtually no documentary evidence, especially in view of the fact that the document depository had been said by all parties to contain almost two million documents. The civil plaintiffs had filed a selection of these documents with the court in the civil litigation. My knowledge of those documents is confined to my judicial experience in the civil litigation.

I also agreed with Mr. Maddux that it seemed strange that so many of the defendants in the civil case would have paid so much money, nearly $300 million, to settle a completely unfounded case. Even if this remark could be stretched to constitute a statement that I thought the settling defendants guilty, that would not apply to Mead or any other defendant who has not entered into a settlement agreement in this litigation.

While I was drafting this memorandum, I received a call from Mr. Maddux, who expressed shock and indignation at what he had learned was in Attorney Baker's affidavit. He requested leave to file his own affidavit, which is attached as Exhibit B.

As the third instance of my alleged prejudice, Mead cites two statements attributed to my law clerk. One of them is taken from an article published in *Purchasing* magazine, the relevant portion of which is as follows:

> "Linda Marshall, law clerk for Judge Singleton, says industrial buyers may choose not to participate in the settlement and press their own suit, seeking higher payment. If a large number of companies decide to file their own suits, then the amount left of the $298 million for the other will be higher, she told *Purchasing* in an interview."

Mead contends that this demonstrates a prejudice against Mead and other non-settling defendants by encouraging plaintiffs to opt out of the class. Such a reading of the quoted statement is extremely strained; the statement clearly reflects no more than a recognition that class members may opt out and pursue their own remedies if they wish, an undisputed right of which all class members will be informed by class notice this month. The other statement attributed to my law clerk, when put into context, was a response to the suggestion by one of Mead's counsel that a motion for summary judgment on liability could lie in the civil litigation for the time period covered by the acquittal in the trial of those indicted and was apparently a question as to whether summary judgment would be proper in the civil case, where the allegations, burden of proof, evidence, parties, and attorneys were likely to be different from the trial of those indicted.

Under any circumstances, the views of a law clerk, a court reporter, docket clerk, or other court personnel are not the views of the court and, contrary to some attorneys' belief, have little or no influence on a judge's decisions.

I have been on the federal bench for thirteen years. In all that time, I have never been faced with a motion seeking my disqualification. It would appear that the very large amount of money on the table in this litigation, though in no conceivable way influencing my impartiality, provides a strong incentive to attorneys in the case to leave no stone unturned, however unpromising or unsavory. Indeed, a disproportionate number of the cases I have viewed on this issue have arisen in expensive, multidistrict antitrust or other business litigation. I have spent almost two years of intensive work on this litigation, and the familiarity I have gained with the issues and the industry could not quickly or inexpensively be duplicated by another judge. Most of the defendants have reached tentative settlement with the class, class notice is scheduled to go out this month,[5] and an intensive discovery schedule is under way. Delay may be in the interest of some of the litigants, but is not in the interest of justice.

Because I find both that I have no personal prejudice against Mead or any other litigant, and also that no reasonable person could reasonably question my impartiality, Mead's motion for my recusation is DENIED.

DONE and ENTERED this 11th day of September, 1979.

/s/ John V. Singleton
JOHN V. SINGLETON
United States District Judge

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[5] As pointed out in this opinion, Mead has known for months of the grounds alleged in its affidavit and it knows that a trial date is still many months away. It has chosen the Thursday before Labor Day to file this motion, knowing that on the Wednesday following the long weekend a final form of notice would be approved for mailing September 15.

EXHIBIT A

A corporation is in law a person, but of course it cannot act otherwise than through its directors, officers, employees, or other agents. Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact at issue in this case, need not be established by direct evidence. It must be established beyond a reasonable doubt. Every act of every director or officer or employee or other agent on behalf of or in the name of a corporation, if done within the scope of their authority, is in law the act of the corporation itself.

However, the Government must prove beyond a reasonable doubt that each corporation—Mead and Continental—possessed the required intent as defined in these instructions. One of the factors you may consider in determining the intent of each corporation, among other evidence, is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you find that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not the corporation had the required intent. Some of these programs were intended to be more restrictive than the antitrust laws, and the compliance programs are not an accurate statement of the laws on exchange of price information. It is important that you not confuse the terms of compliance programs with the

law, which I am giving you in these instructions. You may consider such a compliance program only as to the intent of the company which propounded it. You may not consider it in determining the intent of any individual defendant.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310 (All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

NOTICE

TO: SEE RIDER ATTACHED

PLEASE TAKE NOTICE THAT ON THE 7th DAY OF SEPTEMBER, 1979, that we filed with the United States District Court for the Southern District of Texas, Houston Division, the Affidavit of William D. Maddux, a copy of which is herewith served upon you.

/s/ William D. Maddux & Associates
WILLIAM D. MADDUX & ASSOCIATES

One North LaSalle, Suite 1909
Chicago, Illinois 60602
312/782-2525

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Lola Kaduszkiewicz, being first duly sworn, deposes and says that she mailed a copy of the foregoing Affidavit to each attorney appearing of record in this cause by depositing a copy of the same in the United Mail Chute located at 1 North LaSalle, properly addressed to said attorneys with proper postage affixed thereto, on this 6th day of September, 1979.

/s/ L. Kaduszkiewicz
L. KADUSZKIEWICZ

Subscribed and sworn to
before me this 6th day
of September, 1979.

/s/ Rebecca Anguhofer
REBECCA ANGUHOFER
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310 (All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

AFFIDAVIT

I, WILLIAM D. MADDUX, being first duly sworn on oath, depose and state that if called as a witness in this cause, can testify competently to the following:

1. It has come to the attention of this Affiant that an attorney, Mr. Hal Baker, has filed a Petition requesting that the Honorable John V. Singleton recuse himself from the trial of this cause based in part on an alleged conversation between Affiant and Judge Singleton, as a result of which it is claimed that Judge Singleton is biased and prejudiced towards Mr. Baker's client.

2. By way of background, it should be recalled that your affiant represented an individual defendant in the criminal case tried before Judge John V. Singleton with a jury from January 21, 1979 to April 27, 1979.

3. That during the trial of said case, your affiant had no occasion to discuss the case in any respect with the Honorable John V. Singleton outside of the contact in the courtroom.

4. That during the course of said case, your Affiant came to know that the Honorable John V. Singleton was an avid golfer and expressed an interest in playing golf with Judge Singleton at the conclusion of the case. A mutual friend informed Judge Singleton of this interest.

5. That after the verdict of the jury was returned finding all of the defendants not guilty, Judge Singleton was kind enough to extend an invitation to your Affiant to play golf, which was done the following day, Saturday, April 28, 1979, during which time your Affiant found Judge Singleton to be an affable and congenial host.

6. That during said game of golf, your Affiant expressed the opinion that the government in the trial of the criminal case must have overlooked evidence since it was difficult for your Affiant to believe that such an extensive grand jury investigation leading to the number of indictments returned. An analysis of the evidence presented at the trial in view of the fact that by the conclusion of the trial, approximately three hundred million dollars had been paid by various defendants in the civil cases in order to settle the civil class action led this Affiant to observe that there surely must have been better evidence available to the government.

7. Judge Singleton relayed to your Affiant nothing more than an observation that Affiant's observation probably had some merit. The observation to Affiant was nothing more than a common sense ob-

servation expressed by counsel for various of the criminal defendants during and at the conclusion of the criminal case.

8. During the informal contact at the conclusion of the case, it was apparent that your Affiant would have no further contact with Judge Singleton on the criminal case nor the civil case and the conversation with Judge Singleton was in the context of an informal lawyer-to-lawyer comment in a relaxed atmosphere and no information was obtained from Judge Singleton, which, in your Affiant's opinion, indicated any bias or prejudice to anyone.

9. In fact, the entire context of a very brief exchange of comments concerning the criminal case, at no time indicated to your Affiant that Judge Singleton was opinionated and certainly did not indicate to your Affiant nor would it indicate to any reasonable observer, that he was in any way biased in favor of or against anyone in any of the matters pending before him or which had terminated.

10. It is the opinion of your Affiant from having observed Judge Singleton's conduct during the course of the extensive trial of the criminal case, that he is a man of extreme patience, possessing a high degree of legal knowledge and judicial temperament. His conduct during the course of the complicated and lengthy criminal trial was certainly beyond reproach and his attitude towards the defendants and defense counsel, both formally and informally, could not reasonably lead any observer with any sense of fairness to conclude that he was in any way biased or prejudiced.

11. It is the intention of your Affiant, by this Affidavit, to express in no uncertain terms, his feel-

ings that the allegations made by Mr. Hal Baker, are in no way based upon fact, are in the nature of "scuttlebutt" which was common amongst defense counsel active in the defense of this criminal case. This did not include Mr. Baker. The conclusions drawn from such scuttlebutt are at the very best devoid of fairness or understanding.

FURTHER, AFFIANT SAYETH NOT.

/s/ William D. Maddux
WILLIAM D. MADDUX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

William D. Maddux, being first duly sworn on oath, deposes and says that he has read the above and foregoing affidavit signed by him, and that the said Affidavit is true.

/s/ William D. Maddux
WILLIAM D. MADDUX

Subscribed and sworn to
before me this 6th day
of September, 1979.

/s/ Rebecca Anguhofer
REBECCA ANGUHOFER
Notary Public